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SUPREME COURT U. S.

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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1923.

No. 232.

ATCHISON, TOPEKA & SANTA FE RY. CO. *Appellant*

vs.

EDMUND R. WELLS, ET AL - - - - - *Appellees.*

PETITION FOR REHEARING BY APPELLEES.

GEO. E. WALLACE,
CLAUDE B. HUDSPETH,
Attorneys for Appellees.

[illegible] BROS. PRINTING CO

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Appellees petition for a rehearing, and their counsel, Geo. E. Wallace, certifies that it is presented in good faith, believing it is meritorious, well founded in point of law, is not made for delay and should be granted and that the judgment of reversal heretofore rendered should be set aside for the following reasons:

We contend that appellant had no such interest in the judgment obtained by Wells against the garnishee as entitled appellant to enjoin same. Such judgment did not seize or condemn any property of appellant. It was

only a personal judgment against the garnishee with no lien upon any property or fund, and to be satisfied by execution against any property of the garnishee. While such judgment was based upon the finding of the court that the garnishee was indebted to appellant, yet such finding was not the judgment. The judgment against the garnishee was personal and unconditional. While such judgment was erroneous, in matter of law, as held by this court, the same could and should have been corrected had the garnishee appealed therefrom. No appeal was taken, nor did the garnishee give notice to the appellant of the garnishment proceeding, or ask it to come in and defend. Such failures upon its part should not be excused by the mere fact that the garnishee set up in its answer the exemption from garnishment of the debt it owed appellant, without prosecuting that defense through the channels provided by law. Therefore the payment of the judgment of Wells against the garnishee would not be a defense when appellant should sue the garnishee for such debt. American Express Co. v. Mullins 212 US 311; Harris v. Balk 198 US 215; Ry. v. Whipsker 77 Tex. 14, 13 SW 639; Goodman v. Henly 80 Tex. 498, 16 SW 432; Barber v. Bank (Tex. Civ.) 218 SW 156, writ of error denied by supreme court, 226 SW xv; Trammel v. Ullman 96 SW 648; Day v. Burnham 82 Mo. Ap. 543; St. L. & S. F. Ry. v. Crews (Okla) 151 Pac. 879; So. Ry. v. Fulford 125 Ga. 103, 5 Ann. Cas. 168 and note.

Certainly, if the garnishment judgment was no defense to the suit of appellant against the garnishee for the debt owing, appellant was not injured thereby and could not enjoin same.

Wells was under no contract with any one not to

sue appellant or the garnishee; and herein, the instant case differentiates, in facts and principle, from Wells Fargo v. Taylor 254 US 175 relied upon by the Court. Taylor was under contract with Wells-Fargo not to sue or make claim against the Railroad company for damages. Wells-Fargo was under contract with the Railroad to indemnify it against any such claim of Taylor. Therefore this Court properly held that the prosecution of such claim by Taylor against the Railroad in violation of his contract with Wells-Fargo was inequitable and contrary to good conscience, and might be enjoined by Wells-Fargo who was directly prejudiced thereby. Would the court have sustained such injunction had not Taylor been under such contract with Wells-Fargo? We think not.

The garnishee could not have enjoined Wells from prosecuting his suit because it had a clear and adequate remedy at law by appeal. Cavanaugh v. Looney 248 US 453.

The Texas courts hold that a judgment of a Texas court rendered against the garnishee on a claim that is for any reason not subject to garnishment, where the garnishee neither notified its creditor of the pendency of such proceeding, nor availed itself of the remedy provided by law for preventing such judgment being rendered or having it set aside on appeal, is no defense when the garnishee is sued by its credtor for the same debt. See Texas cases above cited.

The full faith and credit clauses of the constitution and statute only require other courts to give such effect to a Texas court judgment as the courts of Texas give to it.

The Texas court had jurisdiction over the person of the garnishee and over the subject matter, and rendered

a final judgment. Certainly that judgment was not void, however erroneous in law. See well considered case of Bank v. Simpson (Ky) 77 SW 695. In that case the judgment was held valid, altho the cause of action was based upon a statute which was unconstitutional. See also Marin v. Augedahl 247 US 142; Mutual &c Asso. v. Phelps 190 US 147 at p. 159. Menard v. McDonald (Tex) 115 SW 63. The judgment in favor of Wells against appellant shows upon its face that it is not a personal judgment—a mere form—and expressly limited in its effect to such satisfaction as may be obtained against the garnishee.

As we are in a court of equity, we contend that the failure of the garnishee either to notify the appellant to come in and defend the garnishment, or to appeal from a judgment erroneous in law upon the face of the record and have it set aside in the usual and orderly manner, as contemplated by law it should do, ought in good conscience to estop the garnishee from setting up such judgment as a defense when it is sued for such debt by appellant.

We cannot see that it was contrary to good conscience for Wells to collect the judgment he had obtained against the garnishee, where there was no fraud, accident or mistake, where he was not under contract to forego such claim. We pray that the decree of reversal be set aside and the case be affirmed.

Respectfully submitted,

GEO. E. WALLACE,

CLAUDE B. HUDSPETH,

Attorneys for Appellees.